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In The
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae. Letters of blanket consent of the parties to the filing of amicus briefs have been filed with the Court.[1]

ATLA is a voluntary national bar association with approximately 50,000 members who primarily represent individual plaintiffs in civil actions. Occasionally, ATLA members claim and recover punitive damages on behalf of their clients when they can demonstrate that the clients suffered harm as a result of the defendant's reprehensible conduct. ATLA believes that the remedy of punitive damages is a vital tool both in deterring wrongful conduct and in promoting public safety. These beneficial social purposes would be significantly diminished if the Court were to adopt a "one-size-fits-all" constitutional cap on the ratio that a punitive damages award must bear to the compensatory award that it supplements. ATLA, as a national organization with members in all states, also believes that the Constitution gives states the latitude to follow an approach to punitive damages that allows the finder of fact to consider all of the harm inflicted by the wrongdoer in the state in calculating a punitive damages award. ATLA files this brief in support of Respondent to urge the Court to refrain from stating a specific, arbitrary constitutional test for excessiveness, and instead to continue to measure the constitutional validity of a punitive damages

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[1] Pursuant to Rule 37.6, amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

award primarily by the reprehensibility of the defendant's conduct.

SUMMARY OF ARGUMENT

The Court should decline the invitation of Philip Morris and its supporting amici curiae to simplify the Court's task of reviewing punitive damages awards for constitutional excessiveness by specifying a ratio of punitive to compensatory damages that a punitive award cannot exceed. The Court has repeatedly rejected pleas to endorse a specific constitutional cap, recognizing that any formula would deprive state courts of the flexibility to allow larger awards in cases (like this one) in which the conduct punished is especially reprehensible, the harm is difficult to detect or to redress, or the wrongdoer – though unquestionably guilty and found so by the jury – is likely to evade appropriate punishment. A formulaic cap is inconsistent with the reasonable standards for calculating punitive damages used by many states, which have chosen to control punitive damages by methods other than a strict multiplier. And a constitutional cap on punitive damages would limit the deterrent effect of such awards by making their amounts predictable, enabling businesses to budget for punitive damages as a cost of doing business. The Court should therefore continue to resist the call to adopt a mathematical cap on awards of punitive damages.

The Court should also reject the contention that the Due Process Clause mandates that the jury consider only the injury sustained by the plaintiff in setting an award of punitive damages. Many states authorize the jury to take into account all effects of the defendant's conduct within

the state in assessing punitive damages, and Philip Morris and its supporters have shown no good reason for overriding this rational policy choice. Philip Morris' ability to avoid liability in other litigation through the success of defenses unrelated to its reprehensible conduct is a reason to allow, not to prohibit, consideration of the full extent of harm caused by the defendant in the state. States that allow consideration of the harm done by the defendant to others in assessing punitive damages afford the defendant protection from repetitive punitive awards by restricting the number of awards that can be assessed against the defendant, by allowing the defendant to present to the factfinder evidence of payment of prior awards to mitigate its liability, or by authorizing the court reviewing the award to consider prior punitive awards in determining whether the award is excessive. Each of these safeguards adequately protects defendants like Philip Morris from the risk of repetitive awards, and are all that the Due Process Clause requires.

ARGUMENT

I. The Court Should Not Adopt a Specific Multiplier of Compensatory Damages as a Constitutional Cap on Awards of Punitive Damages.

In his dissenting opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 607 (1996), Justice Scalia warned that the Court's recognition of a constitutional limit on the size of awards of punitive damages would turn every complaint that a punitive award is excessive "into a question of constitutional moment, subject to review in this Court." As Justice Scalia predicted, the Court has become a routine stop in the appellate process

for defendants found liable for punitive damages. Commentators have noted the irony that under the Court's recent decisions, a criminal defendant has no viable argument that a sentence of imprisonment is constitutionally excessive, but a business assessed punitive damages for recklessly endangering consumers of its products enjoys constitutional protection. *See, e.g.*, Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1051 (2005); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 516 (2005). The Court has nevertheless added to its workload the task of reviewing inherently subjective state court awards intended to punish and deter reprehensible conduct.

Petitioner Philip Morris attempts to make the Court's task easier by proposing that the Court adopt a precise constitutional cap of four times the compensatory damages. Pet. Br. 34-35. The method proposed by Philip Morris for easing the Court's workload conflicts with repeated refusals to adopt such a cap in recent cases. It also clashes with the approaches taken by many states in policing punitive damages awards for excessiveness and would diminish the deterrent effect of punitive awards.

A. This Court Has Repeatedly Rejected Entreaties To State with Precision the Maximum Ratio That an Award of Punitive Damages Must Bear to Compensatory Damages.

From the time that the Court first discovered in the Due Process Clause a substantive right for defendants in tort cases to be free from excessive awards of punitive damages, the Court has been urged to announce a formula

for determining when a punitive damages award is constitutionally excessive. Recognizing that one of the virtues of the common-law system for punishing tortfeasors is its flexibility, the Court has consistently and emphatically rejected these requests. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (the Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. . . . It is appropriate, therefore, to reiterate our rejection of a categorical approach.") (emphasis in original); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) ("We have recognized that the relevant constitutional line is inherently imprecise rather than one marked by a simple mathematical formula.") (internal quotation marks and citations omitted); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). In *Campbell*, the Court observed that "[s]ingle-digit multipliers are *more likely* to comport with due process," 538 U.S. at 425 (emphasis added), but the Court did not retreat from its previous rejection of a fixed or even presumptive constitutional cap.

Moreover, the proposal of a strict cap on the ratio between punitive and compensatory damages conflicts

with the tradition of proportionality that served as the basis for the ratio guidepost in *Gore*, which measured proportionality of the punitive award to the *harm*, not to the compensatory award. To be sure, the text of the *Gore* opinion referred to the relation between punitive and compensatory damages, 517 U.S. at 581, but the supporting footnote makes clear that the comparison is to actual damage or injury:

> *See, e.g., Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) ("[E]xemplary damages allowed should bear some proportion to the *real damage sustained*"); *Saunders v. Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery v. Baltimore & Ohio R. Co.*, 15 D.C. 111, 125 (1885) (when punitive damages award "is out of all proportion to the *injuries received*, we feel it our duty to interfere"); *Houston & Texas Central R. Co. v. Nichols*, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex. 1882) ("Exemplary damages, when allowed, should bear proportion to the *actual damages sustained*"); *McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (punitive damages "enormously in excess of what may justly be regarded as compensation" for the injury must be set aside "to prevent injustice").

517 U.S. at 581 n.32 (emphasis added).

The significance of the distinction between comparing a punitive award to the compensatory award and comparing the punitive award to the harm sustained lies in the reality that not all significant harms are fully compensated. For example, in many states, wrongful deaths are notoriously undercompensated because of statutory – and,

frequently, idiosyncratic – limitations on the amount of damages recoverable. Some state wrongful death statutes impose a ceiling on recoverable damages, regardless of the severity of the actual loss.[2] In many jurisdictions wrongful death recoveries are limited to economic loss and do not include damages for pain and suffering that the victim might have recovered.[3] The wrongful death of a child, for example, which generally causes only limited demonstrable economic loss, often results in extremely low compensation when compared to the magnitude of the harm. Consequently, courts reviewing punitive awards in wrongful death cases have often taken uncompensated harm into account. The California Court of Appeals recently offered this compelling analysis:

> It would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim. Thus, the state has an extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a "cheaper to kill them" mind set, . . . [T]he proportionality inquiry must focus, in any event, on the relationship of punitive damages to the harm to

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[2] *See* Stuart M. Speiser, Charles F. Krause & Juanita M. Madole, RECOVERY FOR WRONGFUL DEATH AND INJURY § 3.6 (3d ed. 1992).

[3] *See, e.g.*, CAL. CIV. PROC. CODE § 377.34:

> [T]he damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

and *see generally* Speiser et al., *supra* note 2, at ch. 3.

> the deceased victim, not merely to compensatory damages awarded.

Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793 (Ct. App. 2003).

Campbell leans in this direction as well. The Court recognized that higher ratios may be required in cases in which the compensatory award may not reflect actual harm, such as "where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582).[4] "In sum," the Court stated, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff *and* to the general damages recovered." 538 U.S. at 426 (emphasis added).

B. Given the Patchwork of Methods for Calculating Punitive Awards by the Various States, a "One-Size-Fits-All" Constitutional Cap Is Unfair and Impractical.

In *Gore*, the Court reiterated the principle that in "our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." 517 U.S. at 568. Each state has

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[4] In its discussion of the reprehensibility factor, the Court remarked that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded . . . to achieve punishment or deterrence." 538 U.S. at 419. The context plainly indicates that the Court intended to emphasize that punitive damages have no compensatory purpose, not that courts may not consider uncompensated harm under the second guidepost.

"legitimate interests in punishment and deterrence," and "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* Given the latitude that the states enjoy, any attempt to articulate more precise criteria for constitutional excessiveness should, to the extent possible, accommodate the standards and procedures followed by the various states in assessing punitive damages. The absolute multiplier proposed by Philip Morris, however, is incompatible with approaches taken by several states in authorizing punitive damages.

In Georgia, for example, a statute caps punitive damages at $250,000 *except in products liability cases* and in cases involving a specific intent to harm. GA. CODE ANN. § 51-12-5.1. The statute expressly provides that there is no limit on the amount of punitive damages that a jury may award in a products liability case, but also provides that in such cases only one award of punitive damages may be recovered in a court in Georgia for the same act or omission regardless of the number of causes of action that arise from the act or omission. GA. CODE ANN. § 51-12-5.1(e)(1). The statute further requires that in products liability cases, seventy-five percent of any punitive damages award must be paid to the state. GA. CODE ANN. § 51-12-5.1(e)(2). "The Legislature passed the 75-percent provision to punish defendants *who have the potential to damage society at large*." *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E. 2d 565, 570 (Ga. 1996) (emphasis added). The Georgia statute is intended to "benefit[] *all Georgia citizens who risk suffering harm from the defendant's acts*." *Id.* (emphasis added). In products liability cases, Georgia has chosen to assess all appropriate punishment in the first case

brought, but prevents repetitive punishment by providing for only one punitive damages proceeding. Under this system, a strict requirement that the punitive award be proportional to the harm sustained *by the plaintiff* makes no sense. The absolute "ratio cap" advocated by Philip Morris would undermine the choices made by the Georgia Legislature in formulating its approach to punitive damages.

The constitutional approach advocated by Philip Morris would be equally unfair and unworkable in Alabama. That state allows recovery *only* of punitive damages in wrongful death cases; compensatory damages are strictly prohibited. *See, e.g., Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1218 (Ala. 1999). Although Alabama has capped punitive damages in other types of cases, it expressly exempts wrongful death cases from the cap. ALA. CODE § 6-11-21(j). As the Alabama Supreme Court explained, "The Legislature has obviously decided that an arbitrary cap cannot be placed on the value of human life." *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044 (Ala. 1991). Because Alabama's system of redressing wrongful deaths does not allow consideration of compensatory damages, the multiplier cap that Philip Morris advocates would not work in Alabama. *See Ramanauskas*, 731 So. 2d at 1218 (Ala. 1999) (noting that because "Alabama law does not allow the recovery of compensatory damages in a wrongful-death case," the "ratio" factor for determining excessiveness identified in *Gore* "is not applicable.").

Application of the proposed constitutional ratio cap would thus directly conflict with, and undermine the policy interests served by, the approaches to punitive damages followed by Georgia and Alabama. The proposed cap would also conflict in less dramatic, but equally

important, ways with methods adopted by other states. Four states – Alaska, Kansas, Mississippi, and Montana – have enacted legislation that effectively caps punitive damages in products liability cases by a percentage of the defendant's net worth or by a multiple of the profits gained from the wrongful conduct, subject to an absolute (but large) monetary cap on the award.[5] These systems prioritize the deterrent effect of punitive damages over the sense of proportion afforded by a ratio. Application of a constitutionally mandated maximum ratio *in addition* to this other way of controlling punitive awards would needlessly interfere with the policy choices made by these states. At least eight other states limit punitive damages to *the greater* of a multiple of the compensatory damages awarded or a specific dollar amount.[6] To impose a constitutionally

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[5] *See* ALASKA STAT. § 09.17.020 (if defendant's conduct had financial motive and defendant knew of outcome before the conduct, cap is the greater of 4 times the compensatory damages, 4 times defendant's financial gain, and $7 million); KAN. STAT. ANN. § 60-3702 (cap is lesser of defendant's highest annual gross income in past five years, 50% of defendant's net worth, and $5 million; if profit exceeds these amounts, cap is 1.5 times the profit); MISS. CODE ANN. § 11-1-65 (cap ranges from 4% of defendant's net worth if its net worth is $50 million or less to $20 million if net worth exceeds $1 billion); MONT. CODE ANN. § 27-1-220 (cap is 3% of defendant's net worth or $10 million). The substantive limitations on punitive damages in all fifty states and the District of Columbia are described, summarized, and categorized in Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, LOY. L.A. L. REV. 1297, 1338-60, 1370-1417 (2005).

[6] ARK. CODE ANN. § 16-55-208 (3 times compensatory award or $250,000, whichever is greater, up to $1 million); FLA. STAT. § 768.73 (if supervisor ratified the conduct, then 4 times compensatory award or $2 million, whichever is greater; if specific intent to harm is proved, then no cap); IDAHO CODE § 6-1604(3) (3 times compensatory award or $250,000, whichever is greater); N.J. REV. STAT. § 2A:15-5.14 (5 times compensatory award or $350,000, whichever is greater); N.C. GEN. STAT. § 1D-25 (3 times compensatory award or $250,000, whichever is

(Continued on following page)

mandated maximum ratio on punitive awards in these states, which may yield a lesser award than that authorized by state law, would similarly impinge on the states' legitimate policy choices.

"Although it might be convenient to establish a multipart test and impose it upon the states, the principles of federalism counsel against such a course." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 483 (1993) (O'Connor, J., dissenting). "The States should be permitted to 'experiment with different methods' of ferreting out impermissible awards 'and to adjust these methods over time.'" *Id.* (O'Connor, J., dissenting) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 64 (1991)). The states, including Oregon, have developed disparate but reasonable and effective methods for identifying excessive awards of punitive damages. The Court should not endorse a strict mathematical test that purports to do the same job but conflicts with the reasonable methods and policies of many states.

C. The Absolute Cap Proposed by Petitioner and Its Amici Would Diminish the Deterrent Effect of Punitive Awards.

Although this Court's recent jurisprudence recognizes a constitutional limit on the size of awards of punitive

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greater); N.D. CENT. CODE § 32-03.2-11(4) (2 times compensatory award or $250,000, whichever is greater); OKLA. STAT. tit. 23, § 9.1 (for reckless disregard, compensatory award or $100,000, whichever is greater; for intentional conduct with malice, 2 times compensatory award or $500,000, whichever is greater; for conduct that threatened a human life beyond a reasonable doubt, no cap); VA. CODE ANN. § 8.01-38.1 (no ratio; absolute cap of $350,000).

damages, nothing in the Court's decisions or in logic guarantees defendants the right to be assessed a precisely predictable award. On the contrary, courts applying state law have acknowledged that predictability tends to negate the deterrent effect of punitive damages. As the Colorado Supreme Court noted, "If punitive damages are predictably certain, they become just another item in the cost of doing business." *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984). "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages." *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989). "The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition." *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 477 (N.J. 1986). Endorsement of a strict ratio as a constitutional maximum would enable defendants in products liability cases more easily to calculate the true cost of marketing dangerous products, which in turn would enable them to pass on the cost to consumers – a perverse result, as the consumers are the very persons being endangered.

Commentators have recognized that a cap on the ratio of punitive to compensatory damages "makes life easier for defendants," but does so "at the cost of the deterrent effect of punitive damages." Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1007 (1999). Because of the manufacturer's ability to pass on the costs of its products, the level of compensatory damages even in cases involving serious physical injuries "may be too low in practice to accomplish proper deterrence. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049,

1051, 1078 (2005) (quoting Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998)). Professor Chemerinsky thus urges that the ratio factor "simply be eliminated in evaluating whether a punitive damages award is grossly excessive." *Id.* At a minimum, a specific ratio should not be adopted as a constitutional standard.

II. The Due Process Clause Does Not Prohibit a Jury from Considering All of the Effects of the Defendant's Misconduct Within the State in Calculating an Award of Punitive Damages.

A. An Absolute Prohibition on Relating a Punitive Award to the Entire Scope of the Defendant's Misconduct Within the State Would Conflict with the Methods and Policies of Many States.

The Oregon statute governing punitive damages in products liability expressly authorizes the finder of fact to consider "the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's. . . ." OR. REV. STAT. § 30.925(2)(g). The statute assumes that the factfinder will base the punitive award on the amount necessary to punish the defendant for harm inflicted not just on the plaintiff, but on others in the state; otherwise there would be no need to consider the mitigating effect of punitive awards to other plaintiffs. Philip Morris and its amici attempt to portray Oregon's statewide approach as an aberration. Pet. Br. 17-21; Br. for Amici Curiae R. J. Reynolds Tobacco Co., et al., 20-27. Even if this were true, "novelty itself is not a vice." *Chandler v. Miller*, 520 U.S.

305, 324 (1997) (Rehnquist, C.J., dissenting). It is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* (quoting *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

But Oregon's approach is not aberrational or novel. Other states allow factfinders to focus not on the defendant's direct relationship with the plaintiff, but on the defendant's conduct and state of mind in committing the acts that injured the plaintiff, in calculating the appropriate punitive damages award.

As described above, Georgia contemplates that plaintiffs in products liability cases will collect "statewide" punitive damages for harm caused in the state by the defendant's dangerous products, as it expressly provides for unlimited punitive damages while restricting the defendant's liability to one award. GA. CODE ANN. § 51-12-5.1(e)(1); *Mack Trucks, Inc. v. Conkle*, 436 S.E. 2d 635, 639 (Ga. 1993) ("It can be seen that subsections (e), (f) and (g) constitute a consistent statutory scheme for the regulation of punitive damages. . . . Because of the potential ability to damage numerous citizens, the defendant may be punished by the imposition of unlimited damages, but this may occur only one time."). In Missouri, a statute provides that a defendant found liable for punitive damages may move the trial court for a credit in the amount of punitive damages that the defendant previously paid for the same course of conduct. MO. REV. STAT. § 510.263(4). As in Georgia, this approach presupposes that the punitive award is intended to punish for *all* harm caused by the defendant in the state, not just the harm inflicted on the

plaintiff. Similarly, in Montana, a statute requires that punitive damages be assessed in a separate proceeding at which "previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act" is considered." MONT. CODE ANN. § 27-1-221(7). Florida and Ohio have recently enacted legislation protecting defendants from awards of punitive damages if a punitive award had previously been assessed against the defendant for the same course of conduct. FLA. STAT. § 768.73(2)(b); OHIO REV. CODE ANN. § 2315.21(D)(5).

There is – and should be – room in the federalist system for the approach to punitive damages taken by these states. It is reasonable for a state to conclude, as did Oregon, Georgia, and the other states identified above, that "society's interest [is] better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided." *Hosp. Auth. of Gwinnett County v. Jones*, 409 S.E. 2d 501, 503 (Ga. 1991). The punitive awards authorized by these systems, and the award approved by the Oregon Supreme Court in this case, are sensible and effective in light of the egregiousness of the conduct involved, the nature and amount of the harm inflicted, and the need for punishment that fits the offender as well as the offense. The Court should not interpret the Due Process Clause to prohibit this reasonable approach to the assessment of punitive damages.

B. The Proposed Constitutional Requirement That a Punitive Damages Award Relate Only to the Harm Suffered by the Plaintiff Would Insure That the Defendant Will Escape Appropriate Punishment for Its Reprehensible Conduct.

Philip Morris argues that the trial judge's refusal to instruct the jury that it may not assess punitive damages for harm suffered by persons other than the plaintiff violated the Due Process Clause because it effectively deprived Philip Morris of the opportunity to show that it was not legally liable to those other Oregonians and because it subjected Philip Morris to an inappropriate risk it will be assessed additional punishment for the same conduct. Neither of these arguments withstands analysis. They surely provide no basis for this Court to enshrine Philip Morris' proposed instruction as a constitutional requirement.

First, as this Court has repeatedly recognized, the primary reference point in calculating an appropriate punitive award is not the amount of damage caused by the defendant – even to the plaintiff – but the reprehensibility of the defendant's conduct. *See Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. One measure of reprehensibility, in turn, is the number of persons that were, or *could have been*, hurt by the defendant's actions. *Campbell*, 538 U.S. at 424-25 (refusing to specify the maximum constitutionally-permissible ratio, "even one that compares actual *and potential* damages to the punitive award") (emphasis in original). Thus, whether or not Philip Morris has been or could be held *legally responsible* for the injuries of other smokers is unimportant. The key fact is that Philip Morris acted with intent to injure those other persons. The

number of those potential victims is certainly fair to consider in calculating the appropriate punishment.

Second, Philip Morris' brief description of its litigation history demonstrates that it is not just reasonable but necessary for the jury to consider the harm to others in assessing punitive damages. Philip Morris notes that in the 50-year history of tobacco litigation, only two cases have gone to trial in Oregon. Pet. Br. 13. It points out that it has prevailed in a "significant majority" of the individual tobacco cases brought to trial, and notes that its "winning defenses" include lack of reliance, failure to prove proximate causation, and the statute of limitations, among others. Pet Br. 14 & n.4. None of these defenses relate to the allegation that Philip Morris fraudulently marketed its tobacco products, and Philip Morris' track record in litigation means only that it is *not* being punished for conduct that this jury found reprehensible. And Philip Morris cannot colorably maintain that its success in the courtroom indicates that it did not injure thousands of consumers in Oregon and millions across the country. As Judge Gladys Kessler recently held, Philip Morris is one of a number of tobacco companies that "survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system." *United States v. Philip Morris USA, Inc.*, ___ F. Supp. ___, 2006 WL 2380622, at *2 (D.D.C. Aug. 17, 2006). These companies, Judge Kessler continued, "marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted." *Id.* For Philip Morris to

suggest that it may not really be responsible for a widespread health tragedy in Oregon is black humor, and the company's uncanny ability to prevail on plaintiff-specific and even technical defenses does not mean that it should escape punishment for engaging in reprehensible conduct that inevitably injured thousands of consumers in Oregon. *See Gavin v. AT&T Corp.*, ___ F.3d ___, 2006 WL 2548238, at *6 (7th Cir. Sept. 6, 2006) (per Posner, J.) (recognizing that a higher ratio of punitive to compensatory damages is permitted "if there are multiple victims and an indication that the tortfeasor has been eluding liability successfully").

This Court has observed that the constitutional ceiling on a punitive damages award is higher in cases in which "the injury is hard to detect." *Campbell*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 581). In such cases, the plaintiff's ability to recover compensation is limited by practical difficulties unrelated to the reprehensibility of the defendant's conduct and does not provide a reasonable basis for measuring the amount of punitive damages appropriate for punishment and deterrence. Similarly, scholars have recognized that "injurers will sometimes be able to escape liability for harms for which they should be held responsible," for reasons such as difficulty in establishing causation, inability to identify the tortfeasor, or the victims' aversion to the legal process. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 888 (1998). They argue that punishment in such difficult cases "should be raised sufficiently so that injurers' average damages will equal the harm they cause." *Id.* at 889. As another commentator has explained, "extra-compensatory damages serve to supplement compensatory damages in such a manner that a

rational actor with awareness of under-enforcement problems would nonetheless consider the externalized costs of its actions, because the prospect of extra-compensatory damages for torts that have actually been detected in effect warrant doing so." Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 122 (2005).

Although it is doubtful that punitive damages ultimately recovered by plaintiffs in Oregon will ever "equal the harm [Philip Morris] cause[d]" in the state, it is a certainty that they will never reach that level if juries must confine their attention to the harm done by Philip Morris to the individual plaintiff. The rule sought by Philip Morris is intended to guarantee that bad actors in mass injury cases never receive punishment commensurate with the harm that they have caused. The rule should not be embraced by the Court.

C. Procedures Already in Place Adequately Protect Philip Morris Against the Risk That It Will Incur Multiple Punishment for the Same Offense.

Philip Morris and its amici point out that Oregon's method of assessing punitive damages creates a risk that Philip Morris will incur other punitive awards for the same conduct, because other Oregonians remain free to sue Philip Morris for the same harm. Pet. Br. 11-12; Br. of the Chamber of Commerce of the United States of America 11-14. Oregon has incorporated into its statutory approach to punitive damages two levels of protection to guard against the risk of multiple punitive awards. First, at the trial level, Oregon law provides that in awarding punitive damages the factfinder must consider, among other

factors, "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected." OR. REV. STAT. § 30.925(2)(g). Other states similarly allow defendants to offer evidence that they have previously paid punitive damages for the same course of conduct in defense or mitigation of a punitive damages claim. *See, e.g.*, MO. REV. STAT. § 510.263(4); MONT. CODE ANN. § 27-1-221(7); FLA. STAT. § 768.73(2)(b); OHIO REV. CODE ANN. § 2315.21(D)(5); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W. 2d 35, 42 (Tex. 1998) (evidence of prior payments of punitive damages is admissible in mitigation of a punitive damages claim); *id.* at 48-53 (finding that the Due Process Clause protects defendants from punitive awards based on the same course of conduct which are excessive in the aggregate).

The Chamber of Commerce argues that the type of protection offered by this statute is "no comfort to defendants," because it places the defendant "in the untenable position of arguing that it should not be liable or punished for alleged wrongdoing while simultaneously introducing evidence that the same conduct caused a prior jury to award large punitive damages." Br. Chamber 11. It is not the job of the Due Process Clause to protect defendants from difficult strategic choices. *See McKune v. Lile*, 536 U.S. 24, 41 (2002) (the "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses,

the Constitution does not by that token always forbid requiring him to choose.") (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

But to provide defendants further "comfort" in defending against repetitive punitive awards, the Oregon system provides a second level of protection, this one at the judicial review stage. Oregon law provides that a defendant may file a post-trial motion to reduce the punitive award based on a showing that "the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages." OR. REV. STAT. § 31.730(3). The statute specifically provides that deciding such a motion "*shall consider* the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages." *Id.* (emphasis added). Thus, Oregon law provides the defendant with an opportunity to offer its arguments that it has been sufficiently punished by prior awards free from the risk that the initial factfinder will interpret this evidence in mitigation as an indication of liability. These provisions of Oregon law more than adequately protect defendants from the risk of redundant punitive damages awards.

CONCLUSION

The judgment of the Supreme Court of Oregon should be affirmed.

Respectfully submitted,

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